United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 74-2684

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT FISHER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is a consolidated appeal from the Order of Hon. Edward Weinfeld denying the Motions of Defendant To Acquit; For New Trial; and To Dismiss the Indictments and entered on November 26, 1974; and from the Judgment of Conviction entered by the Hon. Edward Weinfeld against Defendant on December 6, 1974. Neither decision is reported and there are no supporting Opinions.

The Hon. Edward Weinfeld is a Judge of the United States District Court for the Southern District of New York.

TABLE OF CONTENTS

Statement of Issues..... 1

Statement of the Case..... 4

Statement of Facts..... 7

Argument

I The District Court Erred in Refusing to Examine the Competency of Defendant's Wife to Testify Against him. 12

II The District Court Abused its Discretion in Refusing to Grant the Reasonable Requests of Defendant for Continuance and Thereby Deprived Defendant of Substantial Rights Guaranteed him by the Sixth Amendment to the Constitution of the United States. 21

III The District Court Erred in Permitting the Case to go to the Jury without the Government's Having Shown a Prima Facie Case of Agency between the Defendant and Asserted Nominees; a Reasonably Certain Opening Net Worth for Defendant; or Diligent and Thorough Research and Investigation of Leads to Nontaxable Resources Available to Defendant During the Indictment Years. 31

TABLE OF CONTENTS (cont'd)

IV The District Court Erred, in Permitting Evidence Relating to the New Jersey Trust Property and Related Expenditures to be Submitted to the Jury as Matters of Fact Where the Government Failed Below to Present Sufficient Evidence to Rebut the Presumptions of Legality and Regularity Regarding the Trust Instrument. 35

Conclusion.....39

TABLE OF CASES

BLACK v. U.S.

353 F 2d 885 (1965
Page 21

BOONE v. KERR-MCGEE OIL INDUSTRIES

217 F. 2d 63 (10th Cir. 1954)
Page 36

DUPREE v. UNITED STATES

218 F 2d 781 (1955)
Page 34

FORD v. UNITED STATES

210 F 2d 313 (1954)
Page 34

HAWK v. OLSEN

326 U.S. 271, 66 S. Ct. 116, 90 L. ed 61
Page 22

HAWKINS v. UNITED STATES

(1958) 356 U.S. 74, 3L ed 2d 125, 79 S. Ct. 136
Page 12
Page 13
Page 14
Page 16

HOLLAND v. UNITED STATES

348 U.S. 121, 75 S. Ct. 127, 99L. ed 150 (1954)
Page 34

KENNEY v. UNITED STATES

254 F. Reptr. 262 (5th Cir. 1918) cert. den. 249 U.S. 600
Page 37

OLINGER v. COMMISSIONER OF INTERNAL REVENUE

234 F 2d 823 (1956)
Page 34

PASSMAN v. OLPHANT

77 Misc. 2d 431, 353 NYS 2d 117, 1974

Page 36

TABLE OF CASES (cont'd)

PEREIRA v. UNITED STATES

(1954) 347 U.S. 1, 98L ed. 435, 74 S. Ct. 358
Page 17

TANNEBAUM v. SEACOAST TRUST CO.

198 Atlantic 855 (N.J. Ct. of Chaun. 1938)
Page 36

UNITED STATES v. ONE 1971 FORD TRUCK

346 F. Sup 613 (Cd California 1972)
Page 36

U.S. v. KOPLIN

227 F 2d 80 (1955)
Page 21
Page 30

UNITED STATES v. MACKIEWICZ

401 F. 2d 219 (1968)
Page 15
Page 17

UNITED STATES v. MITCHELL

354 F. 2d 767 (1966)
Page 40

U.S. v. ROSENBLAUM

339 F. 2d 473 (2d Cir. 1964)
Page 37

UNITED STATES v. SIMON

393 F. 2d 90
Page 40

UNITED STATES v. WALKER

176 F. 2d 564 (1949)
Page 13

WEST v. TEXAS

511 Southwest 2d 502 (Texas Criminal Appeal 1974)
Page 37

STATEMENT OF ISSUES

When a serious and substantial objection is raised to the competency of a witness to testify in a federal criminal proceeding, can the Trial Court refuse to inquire into and conduct an examination of the witness and the reasons for the objection to competency?

The Court below was of the opinion that it could.

When a serious and substantial objection is raised to the competency of a witness to testify in a federal criminal proceeding, can the Trial Court refuse to inquire into and conduct an examination of the witness on an assertion that the objection was raised and decided in another legal proceeding?

The Court below was of the opinion that it could

Is it an abuse of discretion for a Trial Court to announce in advance of any request that it will not grant a continuance in a cause and regardless of the eventual reason for the request?

The Court below was of the opinion that it was not.

Is it an abuse of discretion for a Trial Court to utilize its authority over the scheduling of a trial to deprive a defendant of his right to be defended by counsel of his choice?

The Court below was of the opinion that it was not.

Is it an abuse of discretion for a Trial Court to utilize its authority over the scheduling of a trial to deprive a defendant of his right to be adequately and preparedly defended by substituted counsel of his choice?
The Court below was of the opinion that it was not.
Can 17 days be considered, as a matter of law and under any circumstances, adequate time to prepare the defense in an expenditures theory income tax evasion case where the Government has marshalled hundreds of exhibits detailing thousands of transactions and which, in total aggregation, comprise the essential case against the defendant?
The Court below was of the opinion that it could.

Can the Government deny and/or severely restrict access of a defendant prior to trial to its investigatory file in an expenditures theory income tax evasion case when the thoroughness of the Government's investigation is a key element in the judicial acceptance of the expenditures theory as a method of proving income tax evasion?
The Court below was of the opinion that it could.

In an expenditures theory income tax evasion case, can the expenditures of other persons or entities be charged to a defendant on the theory that such persons or entities

are agents or nominees of the defendant for purposes of expenditures without any offer of proof as to the existence, nature, terms, conditions, date of inception and/or termination of the agency or nominee agreement between defendant and such persons or entities?
The Court below was of the opinion that they could.

In an expenditures theory income tax evasion case, can the expenditures of other persons or entities be submitted to the jury for finding that the expenditures of these persons or entities are, in fact, the expenditures of defendant without the Government's establishing or being required to establish a prima facie case of an agency relation for puposes of expenditures between the defendant and such other persons or entities?
The Court below was of the opinion that they could.
In an expenditures theory income tax evasion case, can the Government, as a matter of law, succeed in the prosecution of a defendant without a showing and proof of an opening net worth position for the defendant?
The Court below was of the opinion that it could.
Does a presumption of regularity and legality attach to a regularly drawn trust instrument of the State of New Jersey?
The Court below was of the opinion that it does not.
Can the presumption of regularity and legality be overcome without a prima facie showing of fraud?
The Court below was of the opinion that it could.

STATEMENT OF THE CASE

Defendant was indicted in the Southern District of New York for four counts of wilfully and knowingly attempting to evade the payment of income tax due and owing by him and his wife by filing and causing to be filed false and fraudulent tax returns for the years 1967, 1968, 1969 and 1970, each years' filing being counted as a separate offense. A Grand Jury sitting in the Southern District of New York handed up the indictments on April 11, 1974.

The indictments came on for trial in the Southern District of New York before a jury and Hon. Edward Weinfeld sitting as the trial court.

The case was submitted to the jury on September 16, 1974. The jury was unable to reach a verdict, having split 11 to 1 for conviction. The jury was discharged on September 19, 1974 and New Trial was scheduled for November 4, 1974.

Defendant discharged his Attorney for the first trial on October 4, 1974 and on or about October 12, 1974 obtained new counsel. The new attorneys made Application for a continuance and for reassignment of the trial to a Judge other than Hon. Edward Weinfeld on October 25, 1974. Motion was denied.

Defendant filed Petition for writ of mandamus to compel Hon. Edward Weinfeld to grant a continuance and/or to reassign the case to another Judge. The action was in this Court and under No. 24-2402. The request for Petition was denied on October 30, 1974.

Application for Stay was made to the Supreme Court of the United States. Application was denied on November 4, 1974.

Second trial on the indictments commenced on November 4, 1974. The case was submitted to the jury on November 8, 1974, by the Hon. Edward Weinfeld.

Verdict of Guilty to all counts was handed up by the jury on November 8, 1974.

Motions To Acquit; For New Trial; and To Dismiss the Indictments were made on November 18, 1974. Hearing on the Motions was had on November 26, 1974. Motions were denied.

Notice of Appeal from the denial of the Motions was entered on December 6, 1974.

Judgment of Conviction and Sentence of 15 months imprisonment and $10,000 fine was entered against the Defendant on December 6, 1974.

Notice of Appeal from the Judgment of Conviction was entered on December 16, 1974.

STATEMENT OF THE FACTS

Defendant in this case is Gilbert Fisher, Jr. who presently resides at 446 N. Woodland Street, Englewood, N.J. 07631.(R.712) During the years 1967 through 1970, defendant resided at 470 Lenox Avenue, New York, N.Y.(R.774). Defendant is 56 years of age and owns and operates a variety store in the Harlem area of New York City.(R.793) Defendant also owns a rental property in the same area.

Defendant is the son of Gilbert Fisher, Sr. and Lulu Fisher.(R.553) Gilbert Fisher, Sr. was alive during the years 1967 through 1970, but has passed away since that time.(R.553) Lulu Fisher, the mother of defendant, still lives and is resident at 2186 5th Avenue, New York, N.Y. (R.553)

Defendant served in the armed forces during World War II and was honorably discharged therefrom.(R.103) Defendant married Rosalie Fisher in 1942.(R 102)

After discharge from the service, defendant returned to New York City, took employment for a short time as a porter at Grand Central Station and then became a police officer with the New York City Police Department. He

remained with the Police Department for eight years and resigned in the early 1950's in good standing and with a clear record.

Shortly before leaving the Police Department, defendant opened a restaurant business in which he, his wife Rosalie, his mother, his father, and his maternal aunt, Jane Foy, partcipated. (R. 103) Thereafter and for the period from 1955 to 1965, defendant and his family operated a number of restaurants in the Harlem area. (R. 104)

Defendant's father, Gilbert Fisher, Sr., was a gambler, concentrating particularly in policy or "numbers" form of the enterprise. (R. 556-7). The family business became involved with the handling of numbers and defendant became involved in this gambling form. (R. 556-7)

Defendant became proficient at his gambling enterprise and did quite well.(R.795, 800) However, toward the late 1960's, defendant began to have difficulty with the federal authorities and had to curtail and close down his operations entirely (R. 795)

Defendant and his wife, Rosalie, had no children.(R.48) Marital troubles developed between defendant and Rosalie.

Defendant sought the companionship of Bernice Duncan, who bore him two sons out of wed-lock. One son was born in 1962 and the other in 1963. (R. 752)

After the birth of his second son, defendant left the home that he had maintained with Rosalie Fisher at 2190 Madison Ave., New York City, where Rosalie Fisher still lives, and took up residence of his own at 470 Lenox Ave. (R. 752)

He did not live as husband to wife with Rosalie Fisher after this time.(R.793)

During the time of their living together and their joint participation in the gambling enterprise, defendant and his wife put aside money in a number of different forms and places. (R. 107, 803, 760). At least one "hoard" was cash in the amount of $193, 700.00 that was under the control of Rosalie Fisher. (R. 107, 762) This money was in a safety deposit box at Manufacturers Hanover Trust Co.(R. 546-48) Large amounts of cash were kept in defendant's home. (R. 472)

Lulu Fisher and Gilbert Fisher, Sr. loved their grandchildren very much. (R.558). Gilbert Fisher Sr. had accumulated a great quantity of cash from his participa-

tion in the numbers business. (R.557) He kept the money at his home. (R.557)

Lulu Fisher and Gilbert Fisher, Sr. decided to make provision for the children that defendant had had by Bernice Duncan. They purchased land in New Jersey, built a house upon it, and deeded it in trust to the benefit of the children and with defendant as one of the trustees of the property. (R559-60, See Testimony of Aaron Nussman R. 365-398) The great bulk of the expenditures for the construction of the house were made during 1967.

Though defendant and Rosalie Fisher had not been together for a number of years, Rosalie Fisher undertook to file joint income tax returns for the years 1967,1968, 1969 and 1970. She was apparently desirous of the lower tax rates and,to further reduce her liability for taxes, claimed a number of false deductions. She signed defendant's name to the returns as if it were his signature and later swore that it was defendant's signature through the time of grand jury indictment and until the time shortly before the inception of the first trial of defendant on the charges of having filed false returns. (R.219-245)

The Internal Revenue Service began an audit of the re-

turns in 1972 after the Government had failed in an attempt to prosecute the defendant for gambling violations. The audit also came just after the period in which defendant had initiated divorce proceedings against Rosalie Fisher to enable him to marry Bernice Duncan and legitimatize his two children.(R.713-841)

The apparent bitterness and understandable resentment that Rosalie Fisher felt toward defendant at that time caused her to make numerous false statements to the Agents investigating the false returns that Rosalie had filed implicating defendant and placing primary responsibility for the false returns, their preparation, and their ascription upon defendant.(R.219-45)

The Government did not obtain or attempt to obtain from defendant any leads as to the existence of non-taxable resources available to him at the beginning of 1967 or afterwards; did not obtain from him or attempt to obtain from him any statement or estimate of net-worth; and offered no opportunity to him to pay or offer to pay any of the taxes that they eventually charged as being owed by him.

Rosalie Fisher being of the opinion that reconciliation is still possible has appealed the divorce and the action cannot be finalized before October, 1975, when the Supreme Court of Nevada has the appeal scheduled for hearing.

ARGUMENT I

THE DISTRICT COURT ERRED IN REFUSING TO EXAMINE THE COMPETENCY OF DEFENDANT'S WIFE TO TESTIFY AGAINST HIM.

Rule 26 of The Federal Rules of Criminal Procedure provides in relevant part as follows:

> In all trials the testimony of witnesses shall be taken orally in open court ... the ... competency and privileges of witnesses shall be governed ... by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience.

In the case of Hawkins v. United States (1958) 358 U.S. 74, 3L ed 2d 125, 79 S. Ct. 136, the Supreme Court made a definitive interpretation and ruling in the matter of the competency of spouses to testify against each other in the Federal Courts. The Court in Hawkins held that a spouse is incompetent as a witness to give testimony against his marital partner in the Federal Courts. Mr. Justice Black speaking for the Court reasoned that the holding barring husband and wife from taking the stand against each other was grounded in public policy. He stated as follows:

> ...We are not prepared to say the same about the rule barring testimony of one spouse against the other. The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake

> was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now. Moreover, it is difficult to see how family harmony is less disturbed by a wife's voluntary testimony against her husband than by her compelled testimony. In truth, it seems probable that much more bitterness would be engendered by voluntary testimony than by that which is compelled. But the Government argues that the fact a husband or wife testifies against the other voluntarily is strong indication that the marriage is already gone. Doubtless this is often true. But not all marital flare-ups in which one spouse wants to hurt the other are permanent. The widespread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage. 358 U.S. 74, 77-8.

The Hawkins ruling put to rest a good deal of dissention and confusion that had arisen in the Circuits prior to that time and concerning the question of the continued validity of the historical common law restrictions surrounding spousal testimony.

In this Circuit, Chief Judge Learned Hand clearly forcast the holding and opinion of the Supreme Court in Hawkins. In the case of United States v. Walker

176 F. 2d. 564 (1949), the defendant was convicted of transporting sums of money interstate, that had been taken by fraud, with the intent to steal same. His was a "confidence game" pursuant to which he defrauded women by bigamously marrying them and then absconding with their funds. However, in relation to one of these women, the defendant by circumstance effected a legally binding marriage. He left her in destitution and subsequently "married" two additional women pursuant to his usual pattern. At his trial, all three women were permitted to testify. The "wife" with whom he had effected a binding marriage was in the process of obtaining a divorce at the time of trial. Tenuous as the marriage bond was in this case, Chief Judge Hand ruled that the conviction of the defendant had to be overturned because this "wife" was incompetent to testify against the defendant.

Chief Judge Hand, citing the confusion that had arisen in the Circuits on the matter of spousal incompetence, brought this Circuit into line with the position eventually made general by Hawkins. Recognizing the conflict that the incompetency rule posed to the interest in seeking absolute truth in the Courts,

he stated:

> .....This conflict of interest is by no means one-sided, because, although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse my overtures of reconciliation than the memory of what will ordinarily rankle as treachery. Nor is it either practicable or desirable to make the decision dependent upon the Judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save. That was true, no doubt, here; but we must look beyond the case before us. The question will always arise in the progress of the trial; it must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously. The common law avoided such an inquiry by taking divorce as the only test; and, while the privilege persists at all, there is every reason so to limit the exception.

In the case of United States v. Mackiewicz, 401 F. 2d 219 (1968), this Circuit demonstrated its continuing sensitivity to the privileged aura of the spousal relation in the matter of statements of one spouse being the means of endangering the liberty of the other in a criminal prosecution. Judge Moore stated for this Court:

> The question here presents a variation of the

> of the Hawkins rule. May a husband's voluntary out-of-court statements, made when acting as agent for his wife, be repeated by a third person and used against his wife at a joint trial in which neither spouse consents to their use? Under these circumstances, we think so, for (a) since the statements were not actually testified to by the husband at trial, they did not jeopardize domestic peace, (b) since Mr. Mackiewicz testified, the danger of prejudicial hearsay is greatly reduced, and (c) the statements were made voluntarily when Mr. Mackiewicz was an implied agent for his wife.
>
> This is not a case where the prosecution called the husband to the stand. If he had testified under those circumstances, the common law rule would have been violated. Here, however, we are one step removed from actual testimony. Therefore, there is no chance that we might be repulsed by a spouse actually testifying against his mate.

It is clear that this Circuit recognized the common law rule that one spouse is incompetent to testify against the other no matter how tenuous or estranged the marriage relation may be.

There are, however, additional and subsidiary considerations that control the application of the incompetency doctrine at common law. Comment is made upon these considerations in 8 Wigmore, Evidence 2230 which states, in part, as follows:

> The policy of the privilege, whatever it may be applies only to those who profess to maintain toward each other the legal relation of husband and wife. There is therefore no privilege to withhold the testimony of a mere paramour or mistress.
>
> Furthermore, the lofty object - protecting from invasion the sanctity of marital peace is deemed to extend only to those who legally are husband and wife, whatever their honest and innocent belief may have been as to the validity of their relation.

The rule of spousal incompetency is inapplicable to bar testimony by a divorced spouse against his or her former spouse in the latter's criminal prosecution. This rule is applicable to the Federal system by virtue of its adoption by the Supreme Court in Pereira v. United States (1954) 347 U.S. 1, 98L ed. 435, 74 S. Ct. 358; see also 8 Wigmore, Evidence 2237(2).

The obvious reason for which a divorced spouse is made competent to testify is that the marriage has ceased and there is no longer any relevant application of the public policy of incompetency to encourage the maintenance of the marriage bonds. As has been noted above in Mackiewicz, the divorce must be final and not simply "in process". The marital bonds must be completely severed and the marriage "dead" by all normal

legal considerations and incapable of revivification.

A defendant believing himself to be faced with or about to be faced with the incompetent testimony of his spouse should make timely objection and assert his claim of privilege.

> It has been intimated that a party objecting to the testimony of a spouse should interpose his objection at the time the testimony is offered. Further, following its general rule, the objection should go to the competency of the witness, not to the evidence offered. 58 Am Jur 207

Once the objection is raised, the Trial Court is under a duty to inquire into the matter of the assertions of incompetency before the witness is allowed to take the stand and offer any testimony.

> In case of timely objection to the comtency of a person offered as a witness, it is the duty of the Court to make such examination as will satisfy it as to the competency of the person to testify, and thereupon to rule on the objection accordingly. It may not refuse such examination on the ground that the question was raised and decided on another occasion and in a different legal proceeding.* (*Emphasis supplied.) 58 Am Jur 211

In the case at bar, Rosalie Fisher, the defendant's wife, was the principal witness for the prosecution against

him. Defendant is in the process of separating himself by divorce from Rosalie Fisher. Decree in favor of the Defendant was entered by the Third Judicial District Court of the State of Nevada In and For the County of Lander (R 812-814). This Decree has been appealed by Rosalie Fisher to the Supreme Court of the State of Nevada where the matter has been calendered for hearing and argument in October 1975 (R 819-841). Rosalie Fisher has challenged the jurisdiction of the Third Judicial District Court over the marriage, arguing that Defendant did not establish proper residence in Nevada and has further argued that the Decree was entered by error and mistake (R 821-823).

Should Rosalie Fisher succeed upon either of these points, the Decree will be void and will have been void from issuance. In any event, the mere fact of a pending appeal has rendered the Decree non-final.

Defendant was not personally aware of the appeal or its effect until the night preceding the initiation of the trial below. The Trial Court was informed immediately upon the inception of the trial of the information that had come into his hands concerning the appeal.

Objection to the competency of Rosalie Fisher was made immediately and claim of privilege laid (R 13-14).

Judge Weinfeld simply disregarded the claim of privilege; refused even to consider any question as to the competency of Rosalie Fisher to testify; failed to summon Rosalie Fisher for any questioning concerning the alleged basis of her incompetency; and idsmissed the objection to her competency out-of-hand, reciting that he was satisfied that Defendant had no privilege and that, if he did, the privilege had been waived on another occasion in a different proceeding (R 19). This was plain error

ARGUMENT II

THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT THE REASONABLE REQUESTS OF DEFENDANT FOR CONTINUANCE AND THEREBY DEPRIVED DEFENDANT OF SUBSTANTIAL RIGHTS GUARANTEED HIM BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The matter of a continuance in an income tax evasion case or any case is within the sound discretion of a Trial Court. The Trial Court has the right and privilege of dispatching its business in the manner, within historical confines, as it sees fit. Black v. U.S. 353 F 2d 885 (1965).

Ordinarily a reviewing court will not interfere in the question of whether or not a requested continuance should have been granted. A reviewing court will not presume to interpose its preference on the matter of whether it would have granted a continuance in the circumstances in which the Trial Court refused to grant such a continuance. Custom and precedent dictate deference to the decision of the Trial Court.

However, this deference is not absolute and is not without exception. It is recognized that Trial Courts can and have abused their discretion. U.S. v. Koplin

227 F 2d 80 (1955). It is also recognized that an abuse of discretion by a Trial Judge in his management of a criminal case can deprive a defendant of substantial rights guaranteed to him under the Constitution of the United States. In such circumstances of demonstrated abuse of discretion, Appellate Courts have intervened and, indeed, are compelled to intervene out of deference to the highter dictates of equity, custom and the Constitution. Hawk v. Olsen, 326 U.S. 271, 66 S. Ct. 116, 90 L. ed 61.

In the case at bar, there has been a clear abuse by the Trial Court of its discretion and that abuse of discretion has deprived the defendant of substantial rights guaranteed him by the Sixth Amendment to the Constitution of the United States. The circumstances of the demonstrated abuse are as follows:

> Defendant was indicted for income tax evasion on April 11, 1974 (R 1-3). He retained Gilbert S. Rosenthal, a well-known and experienced Federal practitioner as his attorney. The Government made its hundreds of exhibits encompassing more than a thousand individual papers

and its investigatory memoranda detailing several years work of several agents available to Mr. Rosenthal in his office for research and defense preparation. (See list R 19-24.) A little less than six months after the indictment, and on September 9, 1974, defendant went to trial on the charges against him. The case was submitted to the jury on September 16, 1974 after a week of testimony and with a stipulation consenting to the admission of all the hundreds of exhibit items. The jury was out for 3 days and on September 19, 1974 announced itself unable to produce a unanimous verdict. (R 4) The announcement of a hung jury occasioned an emotional outburst by Judge Weinfeld who was obviously and extremely upset that the jury had not convicted the defendant. (R 5) Though Judge Weinfeld was careful to say that the jury was at liberty to have decided either way and that his disappointment was in their failure merely to reach a unanimous decision, his comments on the "simplicity" of the case and the "substantial" nature of the evidence considered in the light

that the defendant did not take the stand; placed only a few witnesses on the stand; and that the Government used almost all the time of the trial in the adduction of its case - leave little doubt that his anger was directed at the one juror who refused to join his colleagues in a verdict of guilty - which, quite obviously, Judge Weinfeld thought was proper in this case. His accusations that "extraneous" factors had entered the deliberations of the jury - or of the one juror who held out against his peers - were by the most kind assessment - unjudicious (R 6). More, they demonstrate plainly that Judge Weinfeld had made up his mind that defendant is guilty and considered the inability of the jury to sanction that view and the necessity of a second trial an irritating annoyance. There can be little other explanation for his extraordinary performance on September 19, 1974 or his subsequent responses to the reasonable requests of the defendant.

In the meantime, defendant, rightfully or wrongfully, had come to doubt his attorney, Mr. Rosenthal, and the quality of the defense he arranged for him. His dissatisfaction led him to have an emotional outburst with Mr. Rosenthal late on Friday, October 4, 1974, during which he discharged Mr. Rosenthal as his attorney and without having another attorney prepared to assume the case. (R 8)

Promptly on Monday, October 7, 1974, Mr. Rosenthal informed Judge Weinfeld of his discharge. This information led to Judge Weinfeld's issuing the remarkable, and unsolicited, directive reprinted at p. 10 of the Record. There is no other way to read that directive than that Judge Weinfeld was announcing <u>in advance</u> that he would deny any request for a continuance <u>regardless of the reason</u>.

Under these circumstances, and without defendant's having done anything to warrant such gross arbitrariness, the refusals to grant or even consider the very reasonable and modest con-

tinuances requested by defendant's new attorneys, once they were retained, constitute a clear and obvious abuse of discretion on the part of Judge Weinfeld. (R 11-16, 30-37) Judge Weinfeld even went so far as to threaten defendant with a revocation of his bail, if he did not go to trial on November 4, 1974 - two weeks after the entry of his new attorney into a case that Mr. Rosenthal, his predecessor, was given six months to prepare for initially and six weeks by Judge Weinfeld to prepare for simply a re-run of (R 37, 7).

Defendant, through his attorney, Mr. Wallace, sought to employ Atty. Paul Perito, an experienced Federal trial lawyer, to conduct his trial defense. Mr. Perito was willing and anxious to take the case but, because of the need to prepare and a conflict in his schedule with another case, he could not commence trial on November 4, 1974 and asked for a three week continuance which was refused by Judge Weinfeld (R 38-42). Because of the refusal, Mr. Perito could not enter

an appearance in the case and defendant was deprived of the services of the trial counsel of his first choice. Consequently, defendant's rights under the Sixth Amendment to the Constitution of the United States to be permitted to be defended by the counsel of his first choice were abridged and denied by the abusive refusal of Judge Weinfeld to grant a continuance to defendant. Mr. Perito and Mr. Wallace were able to locate a young and able Federal trial practitioner in the person of Mr. Gary Naftalis whose schedule was fortunately open and who was prevailed upon to take the case with all its difficulties in order to protect defendant from the bail forfeiture threatened by Judge Weinfeld. Mr. Wallace is not an experienced Federal trial practitioner and Mr. Naftalis' participation at trial was considered vital and necessary by Mr. Wallace. Mr. Naftalis made request of Judge Weinfeld on November 4, 1974 - the day of the initiation of trial - for a continuance of only several days so that he could review the voluminous exhibits that he had not up to that time

seen and the "3500" material of the Government which had been withheld from defendant's attorney, Mr. Wallace, by specific instruction to Mr. Rosenthal that he not turn them over to the new lawyers with the other case materials of defendant. The motion was denied (R 56-62, 17).

It is obviously and grossly unfair to compel a defendant under threat of bail forfeiture to trial and defense of his liberty where the prosecution is an expenditures method tax evasion case involving thousands of fiscal notations and transactions over a four year period, hundreds of interviews by multiple I.R.S. Agents, and dozens of prosecution witnesses where his attorneys are given 17 days to absorb and prepare a defense against all the information and witnesses accumulated by the Government over a period of three years and where the Government denies access to all "3500" material until the week-end before the commencement of the trial and where the Trial Court denies the right of the attorneys to object to any of the material, in any event, be-

cause of a stipulation supposedly entered into in another trial by another attorney in whom the the defendant has lost all faith.

The circumstance in the Trial Court was crude. The mockery that the Trial Court made of defendant's Sixth Amendment right to defend himself was obvious and obnoxious to any decent sense of constituional and judicial order. U.S. v. Koplin, supra

ARGUMENT III

THE DISTRICT COURT ERRED IN PERMITTING THE CASE TO GO TO THE JURY WITHOUT THE GOVERNMENT'S HAVING SHOWN A PRIMA FACIE CASE OF AGENCY BETWEEN THE DEFENDANT AND ASSERTED NOMINEES; A REASONABLY CERTAIN OPENING NET WORTH FOR DEFENDANT; OR DILIGENT AND THOROUGH RESEARCH AND INVESTIGATION OF LEADS TO NONTAXABLE RESOURCES AVAILABLE TO DEFENDANT DURING THE INDICTMENT YEARS.

The instant case presents a bizarre extension of the "cash expenditures" method of circumstantially proving the existence of taxable income. The expenditures noted in this case are in almost every instance, the expenditures of persons other than the defendant. He has been "charged" with all the expenditures of his estranged wife, his common law wife, his parents, trusts of which he is trustee and friends. The argument of the Government is that these persons and entities are agents or "nominees" of the defendant through whom and which and pursuant to some master scheme, the defendant spent large sums of money which derived from income of the period 1967-1970 using these nominees as a screen for the deliberate avoidance of the payment of income taxes.

The theory of the Government was much recited at trial but there was no proof presented by the Government that this "nominee" circumstance existed with any of the people whose ordinary and extraordinary

expenditures were assumed by the Government to have come from money given them by the defendant and further assumed to have come from money which the defendant earned in the period of 1967 through 1970 from a gambling operation assumed to have assisted during that period and each year thereof. (R 468-70) The Government did not produce any of these persons or entities except Rosalie Fisher, the estranged wife, to testify directly to the question of their relation with the defendant and the assumed nominee agency relation. The Government did not adduce enough proof to combat the prima facie presumption that they were economically independent persons or entities. The Trial Court erred and prejudiced the defendant in permitting the documentary proof of these persons expenditures to go to the jury. The Government did not offer any direct proof as to what if any part of the expenditures made by these assumed nominees derived from capital or current income of any of these people. Such shared portion of the expenditures would have constituted a "credit" to defendant reducing and, perhaps, eliminating the asserted unreported taxable income of defendant. The only attempt in this regard put forth by the Government was the hearsay

testimony of Agent Spadola as to his conclusions concerning the fiscal condition of people who were available to be called as witnesses.

Even assuming that all expenditures of these persons could be counted and charged as expenditures of the defendant, the Government nonetheless failed to prove indictment period income of the defendant by the circumstantial deduction method of the expenditures theory because the Government did not establish with reasonable or any certainty any opening net worth for defendant. The Government did not demonstrate any thorough research and investigation to exclude non-taxable resources that might have been in the possession of defendant particularly a cash hoard of $193,000.00 about which the Government had more than ample leads which it simply chose to ignore apparently on some theory that it was not "documented" (R 455, 473). The Government used cost of living and other average or arbitrarily assumed figures for expense, and attributed the amount of these assumed expenses as income to the defendant. (R 428)

The approach of the Government in this attempted appli-

cation of the net worth expenditures theory was so carelessly and poorly done and the calculations so unreliable as a result thereof that it violates the standards set forth in Holland v. United States 348 U.S. 121, 75 S. Ct. 127, 99L. ed 150 (1954). See also Olinger v. Commissioner of Internal Revenue, 234 F 2D 823 (1956), Dupree v. United States 218 F 2d 781 (1955) and Ford v. United States 210 F 2d 313 (1954).

ARGUMENT IV

THE DISTRICT COURT ERRED, IN PERMITTING EVIDENCE RELATING TO THE NEW JERSEY TRUST PROPERTY AND RELATED EXPENDITURES TO BE SUBMITTED TO THE JURY AS MATTERS OF FACT WHERE THE GOVERNMENT FAILED BELOW TO PRESENT SUFFICIENT EVIDENCE TO REBUT THE PRESUMPTIONS OF LEGALITY AND REGULARITY REGARDING THE TRUST INSTRUMENT.

The Government attempted to establish that defendant expended money during the tax years in question for the New Jersey property and then fraudently sought to hide those expenditures through use of his parents' names as settlors on the trust deed. According to the Government's theory, the trust was fraudulent, created by defendant to evade paying a substantial portion of his income taxes for the tax years in question. However, the Government, and the Trial Court as well, failed to consider very fundamental principles of law which presume the legality of private transactions and the regularity of public records.

There is then a presumption in the law that the trust instrument drawn up in connection with the New Jersey property was legal. There is never a presumption of

fraud or wrongdoing in a private transaction absent affirmative proof, Boone v. Kerr-McGee Oil Industries, 217 F. 2d 63 (10th Cir. 1954), United States v. One 1971 Ford Truck, 346 F. Sup 613 (Cd California 1972), Passman v. Olphant, 77 Misc. 2d 431, 353 NYS 2d 117, 1974, Tannebaum v. Seacoast Trust Co., 198 Atlantic 855 (N.J. Ct. of Chaun. 1938). The Government in the present case presents no substantial evidence to rebut the presumption of legality of the transaction creating the trust deed. In fact, testimony by the Government's own witness tended to show the validity and legality of the creation of the trust. Attorney Aaron Nussman testified, on behalf of the Government, that he believed the trust instrument to be duly drawn up for his clients, defendant's parents, transferring the New Jersey property in trust for defendant's children. There was no evidence submitted by this witness or any other Government witness to overcome the presumption of legality of the trust instrument.

In addition, the trust deed, being duly filed with the State of New Jersey, became a public record. There is a well established presumption of regularity and

validity of public records. Unless the presumption is rebutted, such records have been allowed to be used as proof of the facts stated therein. U.S. v. Rosenblaum, 339 F. 2d 473 (2d Cir. 1964), Kenney V. United States, 254 F. Reptr. 262 (5th Cir. 1918) cert. den. 249 U.S. 600, West v. Texas, 511 Southwest 2d 502 (Texas Criminal Appeal 1974). Thus, without an affirmative showing of irregularity in the trust instrument by the Government, the trust deed relating to the New Jersey property should have been allowed to stand as proof that defendant's parents and children, not the defendant, were parties to the transactions involving that property.

Therefore, it was a reversible error on the part of the Trial Court to submit testimony and other evidence to the jury pertaining to the trust property without instructions as to the presumptions of legality and regularity and the burden of the Government to overcome those presumptions. There was an attempt made by defendant to alert the Trial Court to these presumptions and their effects at the close of the Government's case. However, the Trial Court refused

to allow defendant to develop his argument pertaining to the presumption.

The error is reversible because without the expenditures attributed to defendant allegedly spent on the New Jersey property, there is an insubstantial amount of unexplained expenditures by defendant in the tax years in question. Without the expenditures relating to the trust property, the Government, according to its own figures sustains the amounts claimed on defendant's income tax returns for the years in question.

CONCLUSION

NOW THEREFOR, and in light of the foregoing,defendant respectfully prays that this Court will issue its Order and Mandate reversing and rescinding the Judgment of Conviction entered by the United States District Court for the Southern District of New York on December 6, 1974; and, on remand,

(A.) Ordering and requiring a new trial for defendant;

(B.) Ordering and requiring that Rosalie Fisher not be permitted to act and stand as a witness against defendant until such time as there shall be a finalization of the divorce action between defendant and Rosalie Fisher;

(C.) Ordering and requiring that defendant be given and accorded at least 4 months to prepare for the new trial ordered by this Court.

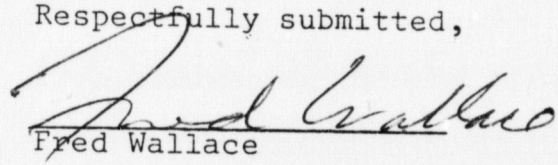
(D.) Ordering and requiring that other trustees and the beneficiaries of trusts upon which defendant is a trustee and expenses of which the Government intends to allege to defendant at new trial be given notice and opportunity to defend against such collateral challenge

to the legitimacy of the trust in a proceeding preliminary to the new trial and decided with a written opinion; and

(E.) Ordering, requiring, and or suggesting in the interest of sound judicial administration that the case be reassigned to another judge for re-trial. See United States v Mitchell 354 F.2d 767(1966) and United States V. Simon 393 F.2d 90

Dated: New York New York
February 12, 1975

Respectfully submitted,



Fred Wallace

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

This is to certify that on this ~~12th~~ 14TH day of February, 1975, I served two copies of the within BRIEF OF APPELLANT upon the following person by hand delivering a true copy of same to him or his clerk.

Kenneth Feinberg, Esq.
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COPY RECEIVED
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